

May 13, 1993.

DEPARTMENTS

Disciplinary Note

Client was injured in an accident in early 1990 and, prior to retaining an attorney, consulted with a chiropractor. The chiropractor presented Client with a document entitled "Doctor's Lien," which contained the following language:

I do hereby authorize the above doctor to furnish you (Attorney) with a report of his examination, diagnosis, treatment, prognosis, etc., of myself in regard to the accident in which I was involved.

I hereby authorize and direct you to pay directly to said doctor such sums as may be due and owing him for medical service rendered me both by reason of this accident and by reason of any other bills that are due his office and to withhold such sums from settlement, judgment or verdict as may be necessary to adequately protect said doctor. And I hereby further give a lien on my case to said doctor against any and all proceeds of any settlement, judgment or verdict which may be paid to you or myself as the result of the injuries for which I have been treated or injuries in connection therewith.

I fully understand that I am directly and fully responsible to said doctor for all medical bills submitted by him for service rendered me and that this agreement

is made solely for said doctor's additional protection and in consideration of his awaiting payment. And I further understand that such payment is not contingent on any settlement, judgment or verdict by which I may eventually recover said fee.

Client subsequently retained an attorney to represent her with respect to the accident in which she was injured. Although the attorney did not sign the "Doctor's Lien" as requested (by the chiropractor,) he did provide the chiropractor with written assurances that his bill would "be paid in full from the proceeds of the settlement in this case." The chiropractor then continued to treat Client for approximately eighteen months and submitted a bill for \$5,162.06 in October 1991.

The case was settled in August 1992 for \$12,000.00. Because an independent medical examination had disclosed little damage to Client as the result of the accident, the insurance company believed that the chiropractor's treatment had been unnecessarily long and refused to consider the entire amount of the bill as a basis for settlement. By this time, Client also had doubts regarding the amount of the chiropractor's bill and the benefit of the treatment so instructed the attorney to release all but \$2,000.00 of the proceeds to her and said that she would deal directly with the chiropractor about the outstanding bill. When his bill was not paid, the chiropractor complained to the Disciplinary Board.

The problem of payment of medical liens is one which keeps arising despite a previous Disciplinary Note on the subject (29 SBB 10, May 5, 1990) and several New Mexico Supreme Court opinions. See, *Romero v. Earl*, 111 N.M. 789, 810 P.2d 808 (1991) and *Matter of Rawson*, 113 N.M. 758, 833 P.2d 235 (1992). In *Romero v. Earl*, the Supreme Court held that once an attorney has accepted from his client an assignment of a portion of the proceeds of the case to a third-party creditor, the client may not unilaterally cancel or modify the assignment in derogation of the rights of the assignee. In *Rawson*, the Court reiterated this position and held that "the attorney in such a situation is obligated to distribute the proceeds of the settlement in accordance with the promise to creditors and, as an obligor with notice of the assignment, is required to pay the assignee." *Id.* at 761, 833 P.2d at 238.

The relevant ethical concept is contained in Rule 16-115 (B) of the Rules of Professional Conduct, which states that:

Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly

render a full accounting regarding such property. (Emphasis added)

An attorney who fails to do this not only violates Rule 16-115 (B) but may ultimately face personal financial liability to the third person, if the funds are no longer in the possession of the client.

How does the attorney reconcile this responsibility with the obligations to provide competent representation (Rule 16-101) and abide by a client's decisions (Rule 16-102)? The question becomes particularly relevant in instances where the third-party's bill is viewed as excessive not only by a defendant/insurer but also by the client and the attorney. There have been occasions where — because the third party's bill (a chiropractor in these instances) was viewed as excessive and the treatments unjustified — insurers have offered and attorneys have accepted settlements which, when all was said and done, sufficed only to pay the chiropractor and the attorney's fees, leaving the client with less than \$500.00. Surely an injured person does not put himself or herself in the hands of an attorney and endure months or years of inconvenience simply to see that the attorney and a provider of possibly unnecessary treatments can make money.

A competent attorney will monitor a client's rehabilitative progress and, to insure that prolonged and/or unnecessary therapy is minimized, perhaps forward the client to a physician for evaluation and advice as to necessary treatment. The attorney will also advise the lienholder in writing that while the attorney will agree to honor the lienholder's fee for any services rendered pursuant to the agreement with the client prior to the client's consultation with the attorney, further claims will be considered in settlement negotiations but payment in full cannot be guaranteed and may need to be compromised if only a small settlement or judgment is obtained.

With respect to one's duty to abide by a client's decisions under Rule 16-102, it should be noted that Rule 16-102 (E) prohibits an attorney from assisting a client in conduct which is not permitted by the Rules of Professional Conduct. The attorney's obligations to the client's creditors relative to any liens and pursuant to Rule 16-115 (B) must be explained to the client. While the attorney may assist the client in resolving any dispute with the lienholder regarding the amount of the bill, the claimed amount must remain in the attorney's trust account until the dispute is resolved. If no resolution can be reached, it may be necessary for the attorney to suggest arbitration or mediation or, in extreme cases, to file an interpleader action.

In the instant case, attorney agreed to accept an informal admonition for his violation of Rule 16-115 (B). He also forwarded the \$2,000.00 still in trust to the chiropractor and agreed to work with the client and the chiropractor to resolve the outstanding amount of the chiropractor's bill. Although the attorney could ultimately be liable for the remainder of the bill under the holding in *Romero v. Earl*, the offer of informal admonition was not made contingent upon his payment of the remaining bill. The Disciplinary Board is not authorized to be and does not wish to become a collection agency and feels that issues such as this are better left to the courts for resolution.

Bar Commissioners

Notice of Special Meeting of the Board of Bar Commissioners

The special meeting will be held
May 21st at the
State Bar Offices at 10:00 a.m.

Agenda:

- Discussion on size and cost of Bar Building.
- Legal Services Resolution.
- Resolution to Preserve the State and Local Bar Majority in the ABA House of Delegates.